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JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 558

MAGNOLIA PETROLEUM COMPANY, THE OHIO OIL COMPANY, THE SUPERIOR OIL COMPANY and WESLEY WEST, *Petitioners*

v.

FEDERAL POWER COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

The Brief in Opposition filed on behalf of the Federal Power Commission presents a totally erroneous picture of what is involved in this case, both as it was decided by the court of appeals and as it is brought to this Court on petition for a writ of certiorari. The central theme of the Brief in Opposition is the contention that petitioners have no standing to seek judicial review of Order No. 174-A at this time because the order, it is asserted, constitutes merely "rules and regulations" and its applicability to these petitioners is a matter to be determined by subsequent proceedings (Br. in Opp. 8, 12-14). This contention is wholly

without foundation and may possibly create a misconception of the issues to be resolved. Accordingly, we are impelled to file this brief reply.

I

THE ISSUE IN THIS CASE IS NOT WHETHER PETITIONERS ARE NATURAL GAS COMPANIES, BUT WHETHER ORDER NO. 174-A IS A VALID ORDER

Contrary to what the Commission urges, there is no issue in this case as to the applicability of Order No. 174-A to these petitioners and their business activities. *Petitioners affirmatively alleged in their petitions for review that they are "independent producers", as that term is defined in the order, and that the order applies to them and their businesses.*

In its Application for Rehearing before the Commission (App. B, 162-171) and in its petition for Review in the court of appeals (App. B, 214-223), petitioner The Ohio Oil Company alleged (App. B, 163, 215):

> *Petitioner is an "independent producer" of gas as that term is defined and used in Order No. 174-A.* * * * The Order, although not specifically directed to Petitioner will, unless set aside, affect and determine the rights of Petitioner as fully as the Order would had it been directed specifically to Petitioner, instead of to "independent producers", of which Petitioner is one of such class. (emphasis added)

Similar allegations appear in the Applications for Rehearing and the Petitions for Review filed by each of the other petitioners: Magnolia Petroleum Company (App. B, 141, 201); The Superior Oil Company (App. B, 173, 226); Wesley West (App. B, 194, 236).

The class of persons to whom Order No. 174-A is directed is defined, in Sec. 154.91 thereof, as follows (App. A, 80):

> § 154.91 "Independent producer" defined. An "independent producer" as that term is used in §§ 154.91 to 154.102 means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline.

Since each of these petitioners alleged, in their respective petitions for review, that it is an "independent producer" within the meaning of the above definition, the court of appeals was not called upon to determine their status as natural gas companies. Moreover, if, as the Commission contends, "independent producers", as defined in Order No. 174-A, are natural gas companies within the meaning of the Act (Br. in Opp. 3, 4; see also the heading to Sec. 154.92 (App. A, 80): *Filing of rate schedules by producer-gatherer "Natural-Gas Companies"*), then it necessarily follows that these petitioners, by admitting they are independent producers, have also admitted they are natural gas companies. On the other hand, if the Commission is incorrect in this regard, the order, for all the more reason, is reviewable because the Commission has extended its jurisdiction to persons and activities not covered by the Act. In either event, petitioners have standing to challenge the validity of the order.

The Commission is thus shown to be in error when it states that "petitioners question that they are subject to the order at all" (Br. in Opp. 17) and further that "each of these petitions proceeds on the premise that

the petitioners are not 'natural gas companies' subject to the Natural Gas Act" (Br. in Opp. 6, 7). A similar error appears in the Commission's implication (Br. in Opp. 6) that this is the primary claim made by petitioners, citing in support two pages from the opinion of the court of appeals. These pages (Pet. App. 8, 9) reveal no such claim. On the contrary, they embrace footnote 7 of the court's opinion, which sets forth, in ten paragraphs, the substantive issues raised by petitioners. Because of these grave errors, the Commission's effort to sustain the judgment below, on grounds different from those assigned in the opinion, is untenable. Indeed, the judgment cannot be sustained on any ground.

Although it is true that three of the petitioners, Magnolia Petroleum Company, The Superior Oil Company and Wesley West, in their respective applications for rehearing before the Commission alleged that they are not natural gas companies within the meaning of the Act (App. B, 153, 175, 193) and requested the Commission to declare them not to be natural gas companies (App. B, 156, 188, 197), it is likewise true that they did not, in their petitions for review, seek a declaration of the court below that they are not natural gas companies. On the contrary, they confined their attack to the validity of the order as it applies to independent producers, a class to which they alleged they belonged. (App. B, 210, 233, 244). These three petitioners therefore abandoned on appeal any error the Commission may have made in failing to declare their status, and any allegations in their petitions for review that they are not natural gas companies do not preclude their attack upon the validity of an order which they affirmatively allege applies to them and disrupts their established businesses. Moreover, the

fourth petitioner, The Ohio Oil Company, neither alleged that it was not a natural gas company nor requested a determination as to its status as such, by either the Commission or the court of appeals (App. B, 162-171, 214-223).[1]

It is thus seen that the issue as to petitioners' status as natural gas companies was not presented to and was not decided by the court of appeals.[2] The present case is, therefore, clearly distinguishable from *Federal Power Commission* v. *Union Producing Co.*, 230 F. 2d 36 (C.A.D.C., 1956), cert. den. 351 U.S. 927, and *Gulf Oil Corporation* v. *Federal Power Commission*, 230 F. 2d 40 (C.A.D.C., 1956), cert. den. 351 U.S. 973, where Union and Gulf instituted district court equity proceedings to enjoin the Commission from enforcing the order against them on the ground that they and their activities were not subject to the Natural Gas Act. See 230 F. 2d at 37, 39. See also the opinions of the district court, 127 F. Supp. 88, 89; 128 F. Supp. 446, 448. In like manner, *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (C.A. 10, 1956) was different from the present case. In that case, the petitioners refused to admit that the Commis-

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[1] If the decisive factor is whether petitioners did or did not allege that they are not natural gas companies, then certiorari must certainly be granted, at least as to The Ohio Oil Company. Of course, these allegations are not decisive of the reviewability of the order, because if it is invalid as to one of the petitioners, it is invalid as to all, for each alleged that the order applied to it and its business.

[2] As pointed out in our petition (p. 8, fn. 5) the court of appeals did not pass on the Commission's contentions as to (1) prematurity and (2) lack of aggrievement. The sole issue determined by the court below, and the sole question presented here, is whether Order No. 174-A is a reviewable order.

sion had jurisdiction over them and "in fact asked [the Court] to determine that they are not subject to the jurisdiction of the Commission". 231 F. 2d at 464.

Here, petitioners' complaint is directed to the validity of Order No. 174-A, which, they strongly assert, exceeds the statutory authority of the Commission under the Natural Gas Act. They thus occupy precisely the same position as did the complainants in *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, *Frozen Food Exp.* v. *United States*, 351 U.S. 40, and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192,[3] and it is interesting to note that this distinction was recognized in *Federal Power Commission* v. *Union Producing Co.*, 230 F. 2d 36 (C.A.D.C., 1956), where the court in distinguishing the *Columbia Broadcasting* case, observed (230 F. 2d at 39):

> * * * *Columbia Broadcasting System* v. *United States* * * * did not involve the question of CBS' status. That was already clear. The relief asked by CBS was not the securing of a determination as to whether or not certain transactions (and CBS as a participant) were within the terms of the Federal Communications Commission regulations. CBS wanted a court ruling that the regulations in their entirety were outside the agency's statutory authority. * * * The only action remaining in the CBS case was the enforcement by the Commission of the regulations against a station licensee.

In the present case, petitioners, like CBS, make a frontal attack on the order itself and challenge the statutory authority of the Commission to issue such an order. As parties admittedly subject to the order

[3] See our petition for a writ of certiorari, pp. 8-15.

and presently aggrieved by its provisions, petitioners are entitled to have the validity of the order determined by a judicial tribunal *now*, without awaiting subsequent piecemeal proceedings which would be unnecessary if the order is invalid.

II

ORDER NO. 174-A IS SUBSTANTIVE, NOT PROCEDURAL, IN CHARACTER

The Commission argues that Order No. 174-A consists merely of procedural "rules and regulations" which do not affect substantive rights, referring to the "declared purpose" of the order (Br. in Opp. 8) and to the Commission's subsequent statement in the preliminary paragraphs of Order No. 174-B (Br. in Opp. 5; App. A, 103-104). The test, of course, is what the order does, not what a recital thereto says it does. As this Court said in the *Columbia Broadcasting* case (316 U.S. at 416):

> The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive.

As we have shown in our petition (pp. 15-22), Order No. 174-A constitutes a direct and definitive invasion of petitioners' substantive rights. It directs petitioners, who are admittedly covered by the order, to do and not to do things not commanded and not prohibited by the Natural Gas Act.[4] Among other things,

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[4] There is no basis for the Commission's suggestion (Br. in Opp. 3) that, in the absence of Order No. 174-A, petitioners would be subject to the requirements of the Commission's earlier regulations which were admittedly designed to implement regulation of interstate pipeline companies. Not only were those regulations promulgated at a time when the Commission had administratively con-

the order freezes contract prices at the levels in effect on June 7, 1954; it outlaws any subsequent periodic price increases for which provision may have been made in previously executed contracts; it prohibits the abandonment of any sale being made on June 7, 1954;[5] it prohibits petitioners from exercising the rights they expressly reserved to cancel their contracts should they ever become subject to the price-fixing powers of the Commission. See our petition, pp. 4-5, 16-17. These proscriptions are substantive in character. Petitioners are entitled to know *now* whether the Commission has authority to issue such an order.

Petitioners were hurt when the Commission, by the order, rolled back all contract prices to the level of

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strued the Natural Gas Act as not applicable to independent producers, but the regulations, by their very terms, were directed to pipeline operations. See Order No. 99, issued August 26, 1942, Sec. 57.5, 7 F.R. 6844, 18 CFR (1944 Cum. Supp.) 57.5; Order No. 141, Sec. 157.5, 12 F.R. 8600, 18 CFR, 1949 ed., 157.5. Moreover, the regulations as originally issued, implemented the "grandfather" clause, with its optional 90-day provision, in Sec. 7(c) of the Act, 15 U.S.C. 717f (c), (App. A, 135-136) and under the regulations the filing of applications and continuation of service were voluntary. See Order No. 91, issued February 20, 1942, Sec. 57.1-57.4, 7 F.R. 1125, 18 CFR (1944 Cum. Supp.) 57.1 *et seq.* The original pipeline regulations contained no mandatory provisions such as those found in Secs. 157.23(a) and 157.28 of Order No. 174-A (App. A, 85, 89). They applied only to those who voluntarily elected to come under the Act.

[5] It is for this reason, among others, that the present case is distinguishable from *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F.2d 796 (C.A.D.C., 1950), cert. den. 340 U.S. 827, which is cited by the Commission. The *United* case involved FPC Order No. 144 requiring pipelines to convert their rate schedules to a tariff-schedule form. The order did not, however, increase or decrease rates under existing contracts and the Commission assured the court that the order would operate only prospectively. 181 F.2d at 799, fn. 6.

the prices being charged on June 7, 1954 (Sec. 154.94, App. A, 81-83). They were further hurt when the Commission, by merely defining in the order what constitutes a change in a rate, assumed the power, without statutory authority, to suspend every price increase provided for in a gas sales contract.[6] Petitioners should not be required to wait until the Commission exercises the unlawful powers it assumed before they are permitted to attack the validity of the definition and the scheme of rate regulation provided for in the order.[7]

III

THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT

The Commission unsuccessfully seeks to escape the effect of this Court's rulings in the *Columbia Broadcasting, Frozen Food* and *Storer Broadcasting* cases, *supra,* by suggesting that in each of those cases there was no question as to the status of the complainant and the orders involved were substantive rather than procedural in nature (Br. in Opp. 15-17). For example, the Commission notes that in the *Columbia*

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[6] This was accomplished by providing that every future increase under a contract would constitute a change in the rate schedule, necessitating the filing of a new schedule, which when filed would then become subject to the suspension powers of the Commission under Sec. 4(e) of the Act applicable to new rate schedules. Sec. 154.94(a), (b), (c), App. A, 81-83.

[7] Should they wait, they would be confronted with a plea by the Commission that the suspension order is not appealable and its validity cannot be determined by a court. See *Humble Oil & Refining Company* v. *Federal Power Commission,* 236 F.2d 819, pending on petition for certiorari, No. 530, this Term; *Union Oil Company of California and Louisiana Land and Exploration Company* v. *Federal Power Commission,* 236 F.2d 816, pending on petition for certiorari, No. 579, this Term.

Broadcasting case the challenged order applied to "all radio station licensees" (Br. in Opp. 15); that in the *Frozen Food* and *Storer Broadcasting* cases, the attack was against orders of "general applicability" (Br. in Opp. 16). Similarly, it is pointed out that in *Columbia Broadcasting* the order "outlawed certain provisions in existing contracts"; that in *Frozen Food* "the effect of the agency action was to deny the petitioner the right to carry certain commodities", and in the *Storer Broadcasting* case "to limit the scope of its business" (Br. in Opp. 16-17).

Order No. 174-A has exactly the same effect. It applies to *all* independent producers of natural gas and these petitioners admit that it applies to them. It outlaws important clauses in their existing contracts, denies them the right to continue certain activities heretofore conducted, and directly affects and limits their business activities. See our petition, p. 15 *et seq.* The Commission, by its own analysis of these cases, has confirmed petitioners' assertion that the decision of the court of appeals is directly in conflict with the *Columbia Broadcasting, Frozen Food* and *Storer Broadcasting* cases.

CONCLUSION

The Commission, in opposing this petition, raises issues not here involved and not considered by the court of appeals. There is no question as to the status of these petitioners under the Commission's order. The sole question is whether these petitioners are entitled to a judicial review of the validity of the order. Prior decisions of this Court hold that they are.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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